

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-184921

DATE: October 28, 1975

MATTER OF: Verne Woodrow Contractor, Inc.

## DIGEST:

Although contracting officer's letter disagreeing with protester's position may not have been the "final decision" referred to by FPR 1-2.407-8(a)(1), the letter constituted "initial adverse agency action" within the context of GAO's bid protest procedures. Since protest to GAO was filed more than 10 working days after "initial adverse agency action", protest was untimely.

By letter of September 10, 1975, to our Office, Verne Woodrow Contractor, Inc. (Verne Woodrow) protested against the award to any other firm of a contract by the Veterans Administration Hospital (VA), Murfreesboro, Tennessee, for the construction of Supply Warehouse No. 112, Project No. 622-036.

Verne Woodrow filed a written protest initially with VA on June 12, 1975, the bid opening date. By letter of July 16, 1975, the contracting officer notified Verne Woodrow that award would be made to Hardaway Construction Company. (We learned informally that, in fact, the contract had been awarded on June 30, 1975.) By letter dated July 28, the protester's attorney requested the contracting officer to advise him whether the contracting officer's July 16 letter constituted a "final decision" regarding Verne Woodrow's June 12, 1975, protest within the meaning of Federal Procurement Regulations (FPR) § 1-2.407-8(a) (1964 ed. amend. 68). By letter dated July 29, 1975, the contracting officer advised protester's counsel that the matter was being forwarded to the VA Central Office for review. The protest to our Office was received on September 12, 1975, and for the following reason we believe it to be submitted untimely. FPR 1-2.407-8(a)(1) (1964 ed. amend. 68) states in part:

"\* \* \* The protester shall be notified in writing of the final decision on the written protest \* \* \*. An interested party wishing to protest to the Comptroller General of the United States against an award of a contract should do so in accordance with General Accounting Office Regulation [now 40 Fed. Reg. 17979-80, April 23, 1975]."

The protester has stated that it did not file a protest with our Office sooner because it had been awaiting a "final decision" from VA's Central Office. When almost two months had elapsed after the contracting officer's referral of the matter to the Central Office, and no further response was received, the protester came to our Office.

The FPR provision quoted above became effective in January 1970, when our Office's bid protest procedures contained no provisions concerning the timeliness of protests. At that time, a protester could wait for an agency's "final decision" before filing a protest with our Office and not have the protest dismissed for failure to meet a predetermined standard of timeliness. However, on February 7, 1972, we adopted Interim Bid Protest Procedures and Standards which established specific time limits within which protests must be filed with our Office. Those interim procedures have been superseded by new procedures which contain similar time limitations and which are applicable to bid protests, such as Verne Woodrow's, received by us after June 2, 1975. These procedures, which must govern our consideration of this protest, differ from the FPR in that they do not emphasize receipt of an agency's "final decision" on a protest, but advise protesters to file with our Office within a certain time after an agency's "initial" action adverse to the protester. Section 20.2(a) of our current procedures states in applicable part that:

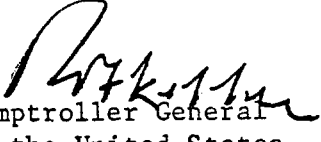
"\* \* \* If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered \* \* \*." (Emphasis supplied.)

In 52 Comp. Gen. 20 (1972) this Office considered the meaning of "initial" adverse agency action with respect to section 20.2(a). We stated:

"'Adverse agency action' may consist of a procurement action (such as the award of a contract despite the pendency of a protest) or, as in the instant case, a decision on the merits of the protest. We realize that a protester may consider an agency's initial adverse action to be ill-founded or inadequately explained, leading the protester to engage in further correspondence with the agency. As you [the protester] observe in your

letter of May 12, it then becomes difficult to identify the final adverse agency action. For this reason, we regard it as obligatory upon a protester to file with our Office within 5 [now 10] days of notification of initial adverse agency action, if it is to be considered timely." Id. at 22-23 (Emphasis supplied.)

The contracting officer's letter of July 16, 1975, in which he disagreed with Verne Woodrow's position, may not have been the "final decision" alluded to by FPR 1-2.407-8(a)(1). However, it unquestionably constituted "initial adverse agency action" within the context of our procedures governing our consideration of bid protests. Since Verne Woodrow filed its protest with our Office more than 10 days after it was notified of this initial adverse agency action, the protest must be dismissed as untimely.

Deputy   
Comptroller General  
of the United States